No. 03-339

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE WORLD JEWISH CONGRESS AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The World Jewish Congress (WJC) is an international federation of Jewish communities and organizations. WJC represents Jews from the entire political spectrum and from all Jewish religious denominations, and serves as a diplomatic arm of the Jewish people to world governments and international organizations. WJC's membership includes more than 100 communities organized in regional frameworks: North America, Latin America, Europe, Euro-Asia, Israel and the Asia-Pacific. The WJC appears in this brief since it played a leading role in the Holocaust restitution movement, which included litigation using the Alien Tort Claims Act ("ATCA"), the very same law being considered in this appeal.[2]

The American Jewish Committee ("AJC"), a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil rights and religious liberty of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all persons are equally secure. AJC believes that the Alien Tort Claims Act provides a vitally important means of redress for non-citizen victims of

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[1] This brief is filed with the written consent of the parties. Their blanket consents have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* 11-14, 133-34, 164-65, 183 (2003) (discussing role of WJC in the Holocaust restitution cases); Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* 52-59, 129-36, 293-314 (2003) (same; author was Deputy Treasury Secretary and Presidential Envoy on Holocaust restitution during the Clinton Administration).

violations of the law of nations, particularly since ATCA claimants often cannot seek justice in their home countries or in other fora.

SUMMARY OF ARGUMENT

Although lawsuits filed in American courts by Holocaust survivors and heirs of victims to obtain a measure of justice for continuing wrongs arising from World War II ("the Holocaust Litigation") present one of the best known uses of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, Petitioner, the United States, and their *amici* hardly mention it in their catalogues of ATCA cases. *See, e.g.*, Brief of the United States as *Amicus Curiae* at 47-48 (enumerating ATCA cases). No wonder: the Holocaust cases do not fit the profile of the "parade of horribles" they seek to represent as ATCA litigation. Far from objecting to the Holocaust Litigation, the Executive Branch enthusiastically participated in the resolution of these cases, and Congress declared its support.

The Ninth Circuit's interpretation of the ATCA is correct. It accords with the prevailing view that customary international law – what was called "the Law of Nations" when the ATCA was enacted – is part of the common law. Those who framed the ATCA understood that to be the case, and available Legislative and Executive Branch pronouncements and nineteenth-century case law are fully supportive, as are this Court's rulings in *First National City Bank v. Banco Para El Amercio Exterior de Cuba*, 462 U.S. 611, 623 (1983), and *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 495 (1964).

The position of the present Administration departs from the hitherto uniform position of the Executive Branch for the last fifty-plus years recognizing the ability of federal courts to hear disputes that may implicate

American relations with other sovereigns. It also contradicts Congress's affirmation in enacting the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 App., Pub. L. No. 102-256, 106 Stat. 73 (1992), that the ATCA "should remain intact to permit suits based on . . . norms that already exist or may ripen in the future into rules of customary international law." 102 H. Rep. 367 (1991).

It is unnecessary to vitiate the ATCA when deference to the political branches is appropriate. Well-developed mechanisms like the act of state doctrine, the political question doctrine, sovereign and other immunities, and the doctrine of *forum non conveniens* provide the federal courts with sufficient means to defer to the political branches on a case-by-case basis when warranted.

Nor do ATCA claims impinge on legitimate corporate business interests. Where, as in the Holocaust cases, the claims are substantial, the ATCA properly endows federal courts with the authority to provide remedies for injustice and grievous injury. For these reasons, the Court should affirm the judgment below.

ARGUMENT

Amici adopt Respondent's brief, and submit the following additional argument.

I. THE ALIEN TORT CLAIMS ACT ENABLED VICTIMS OF THE HOLOCAUST TO BRING WELL-FOUNDED CLAIMS FOR VIOLATIONS OF "THE LAW OF NATIONS" IN U.S. COURTS WITH THE SUPPORT OF THE EXECUTIVE BRANCH AND OF CONGRESS

The ATCA's provision of a private right of action enabled Holocaust survivors and heirs of victims to claim restitution in the late 1990s through a series of actions

brought in U.S. courts (the "Holocaust Litigation").[3] The Holocaust Litigation was brought against Swiss, German, Austrian, French, and other banks and institutions that converted Holocaust victim assets or laundered stolen gold, as well as against industrial entities that participated in and implemented slave and forced labor and "work-to-death" programs and/or medical experiments on Holocaust victims. Ultimately, these entities acknowledged their complicity in the crimes of the Nazis and provided, collectively, roughly $8 billion in compensation and other relief. *Neuborne*, *supra* note 3, at 795.

It is now common knowledge that Swiss and other European financial institutions benefited financially from Nazi-era atrocities.[4] The Independent Commission of Experts ("ICE") was created by the Swiss parliament in December 1996 to examine the complicity of Swiss institutions with the National-Socialist regime and to assess the global scale of the problem of looted and stolen assets located in Switzerland. The ICE recounted in its final report:

> Using the pretext of their duty to protect private property rights, the banks were able to dodge all efforts to conduct serious searches for such

[3] For examples of the actions filed, *see* Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U. L.Q. 795, 796 n.2 (2002).

[4] *See, e.g.*, Independent Committee of Eminent Persons, chaired by Paul A. Volcker, *Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks* 2 (Dec. 6, 1999), *available at* http://www.icep-iaep.org/final_report/ [hereinafter "Volcker Report"]; *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* at iii, prepared by William Z. Slany and coordinated by Stuart E. Eizenstat (May 1997) [hereinafter "Eizenstat Report"].

> ["dormant"] accounts and their owners, and to dismiss applications for restitution from heirs who were unable to prove their title with all the requisite formal evidence. . . . This held true despite the fact that it was in most cases plainly impossible for legitimate heirs, and for the organisations representing the murdered heirs, to procure information such as official death certificates and account numbers. The bankers acknowledged the problem, but opposed any general attempt at regulation for a long period, and did so with success.[5]

In 1996 and 1997, Holocaust survivors and heirs of victims who had deposited money in Swiss bank accounts commenced three class actions against Swiss banks with ties to the United States in the Eastern District of New York. These cases were consolidated before the Honorable Edward R. Korman in the United States District Court for the Eastern District of New York as *In re Holocaust Victim Assets Litigation*, No. CV-96-4849 (E.D.N.Y. filed June 16, 1997).[6]

The parties to the consolidated actions reached a settlement under the court's supervision. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142 (E.D.N.Y. 2000). In exchange for the release of legal claims against the Swiss banks and other Swiss entities, the banks agreed to pay $1.25 billion to various classes of victims, including persons who had deposited assets in

[5] Independent Commission of Experts Switzerland – Second World War, *Switzerland, National Socialism, and the Second World War. Final Report* 512 (Pendo Editions, Zurich, 2002).

[6] *See* Bazyler, *supra* note 2, at 1-58; Morris A. Ratner, *The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches*, 20 Berkeley J. Int'l L. 212 (2002).

Switzerland and their heirs, persons whose assets were looted by the Nazis and laundered through Swiss institutions, slave and forced laborers whose labor generated revenue that was deposited in Swiss accounts, and refugees from Nazi persecution who were denied entry into Switzerland or who were deported from Switzerland. *Id.* at 143-44.

The U.S. Department of Justice expressed its "unqualified support" for the class action settlement, stating that the settlement "is fair and just and promotes the public interest." *Id.* at 148, *quoting* Transcript of Fairness Hearing (Nov. 29, 1999) at 27, 31 (comments of James Gilligan, U.S. Department of Justice, on behalf of the United States). At present, distribution of the settlement is continuing, under the supervision of Judge Korman.

The class of plaintiffs suing the Swiss banks included not only Holocaust survivors residing in the United States, but also Holocaust survivors residing abroad. These alien plaintiffs brought their claims under the ATCA. *See* Bazyler, *supra* note 2, at 55; *see also* Eizenstat, *supra* note 2, at 279-337 (describing subsequent litigation and settlements with German, Austrian, and French banks).

Like the Swiss banks, German companies profited enormously during the Second World War from the victimization of Jews and other minorities. According to Professor Ulrich Herbert, "[t]he National Socialist 'Ausländereinsatz' [use of foreigners] between 1939 and 1945 represents the most sizable case of the massive and forced use of foreign workers in history since the end of slavery in the nineteenth century."[7]

[7] Excerpt from Ulrich Herbert, *Hitler's Foreign Workers: Enforced Foreign Labor in Germany under the Third Reich* (1997), *reprinted in*
(Continued on following page)

The German government did not compensate slave or forced laborers after World War II: "None of the German laws provided any indemnity for the labor [of] the concentration camp inmates. . . . No special recognition was accorded to the fact that large numbers of human beings had been subjected to conditions of slavery." Benjamin B. Ferencz, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation* at xxv (reprint ed. 2002). The government maintained that it bore no responsibility for the enrichment of private industry, while German industry insisted that responsibility fell on the government's shoulders. *See* Michael J. Bazyler, *Litigating the Holocaust*, 33 U. Rich. L. Rev. 601, 613 (1999). Millions of victims were denied redress.

In 1997, the first of dozens of lawsuits was filed against German companies for violations of customary international law. These suits were consolidated in a Multi-District Litigation proceeding before the Honorable William G. Bassler of the United States District Court for the District of New Jersey. *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000). The plaintiffs included American citizens and foreign nationals. The foreign national plaintiffs relied on the ATCA as the basis for subject matter jurisdiction.

Some claims were dismissed on political question and other case-specific grounds unrelated to the scope of the ATCA. *E.g.*, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999). The plaintiffs in all the cases worked closely with Executive Branch officials,

the *Frankfurter Allgemeine Zeitung* (March 16, 1999), *available at* http://www/ess.uwe.ac.uk/genocide/slave_labour13.htm.

victims' advocates such as the World Jewish Congress, and defendants to craft a reasonable settlement to resolve their claims. *See* John Authers & Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle Over the Debts of the Holocaust* 225 (2002).

Litigation against German companies for Nazi-era violations produced significant benefits for survivors. The German government and German companies jointly agreed to create a $5 billion fund to compensate Holocaust victims who suffered at the hands of German entities, to provide an official apology to each victim, and to establish educational programs. In exchange, they obtained voluntary dismissal of the plaintiffs' claims and an Executive Agreement in which the United States agreed to file papers seeking dismissal of future suits in deference to the German Foundation "Remembrance, Responsibility and the Future." *See In re Nazi Era Cases*, 198 F.R.D. 429. The Executive Branch willingly played a significant role in the resolution of the Holocaust cases, and the Legislative Branch declared its support. *See* Resolution Expressing Support for U.S. Government Efforts to Identify Holocaust-Era Assets, 1998 H. Res. 557 (Sept. 29, 1998).[8]

The ATCA provides subject matter jurisdiction and a private right of action to victims of the most egregious human rights abuses. If this Court adopts Petitioner's excessively narrow reading of the ATCA, this avenue of redress will be lost.

[8] *See also* Eizenstat, *supra* note 2, at 213-78, 287-337 (discussing Executive Branch's extensive support for and involvement in the litigation and settlement of the Holocaust cases).

II. THE ATCA PROVIDES BOTH JURISDICTION AND A PRIVATE RIGHT OF ACTION FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

A. The Ninth Circuit's Interpretation of the ATCA Does Not Undermine the Separation of Powers.

1. The Prevailing View of Customary International Law as Federal Common Law Enforceable Under the ATCA Does Not Impede Congressional Law-Making.

Petitioner contends that the Ninth Circuit's interpretation of the ATCA accords federal courts illegitimate law-making authority. Federal courts, however, have been entrusted from the earliest days of the Republic with the authority to interpret and apply customary international law, first as part of the general common law, and now as part of federal common law.

The Framers assigned Congress the power to "define and punish . . . offences against the Laws of Nations," U.S. Const. art. I, sec. 8, cl. 10, but they did so with the intention that the courts continue to interpret and apply customary international law as part of the common law, without a specific grant of statutory authority. The Framers, many of whom were lawyers, were part of a tradition in which it was "an ancient and salutary feature . . . that the Law of Nations is a part of the law of the land, to be ascertained and administered, like any other, in the appropriate case." Edwin Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Penn. L. Rev. 26, 26 (1952). They were well-versed in the highly influential treatise of Sir William Blackstone, who summarized the common-law understanding that "the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the

land." 4 W. Blackstone, *Commentaries on the Laws of England* 67 (1769); *see* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 824, 834 (1989) ("There is no reason to suppose that only one branch of the federal government was responsible for interpreting the law of nations.").

The ratification of the Constitution did not alter the status of the law of nations as common law subject to adjudication by the courts. Alexander Hamilton maintained that "[i]t is indubitable, that the customary law of European nations is a part of the common law, and, by adoption, that of the United States." Hamilton, *Letters of Camillus*, No. 20 (1795), *quoted in* Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740, 742 (1939); *see also* 1 Op. Att'y Gen. 57, 59 (1795) (aliens injured in an attack on a British colony in violation of a treaty of neutrality clearly have "a remedy by *civil* suit in the courts of the United States") (emphasis in original).

Section 9 of the Judiciary Act of 1789, the same section that set forth what became the ATCA, gave the federal courts jurisdiction over common law crimes. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 73 (1923). Placed in such proximity, the grant of jurisdiction for "original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations" is logically read as recognizing that the law of nations is part of the common law. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 232 (1995-96).

Throughout the nineteenth century, both state and federal courts interpreted and applied customary international law as part of the common law. *See Huntington v.*

Attrill, 146 U.S. 657, 683 (1892) ("the question of international law . . . is one of those questions of general jurisprudence which that court [in which the suit is brought] must decide for itself"); *Swift v. Tyson*, 41 U.S. 1 (1842) (declaring the law merchant, or general principles of commercial law, to be part of the general common law). Indeed, in several cases the Supreme Court denied review of state court determinations of international law, reasoning that such decisions did not raise a federal question but rather presented issues of "general law." *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 163 (1894); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875); *see also* Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1558 n.18 (1984) (citing cases). The Court confirmed these holdings in *The Paquete Habana*: "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900).

The renunciation of a federal general common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), did not affect the rule in *The Paquete Habana* that federal courts are to interpret customary international law as part of the federal common law. Moreover, *Erie* is a case about federalism. No federalism issues are presented when, as here, customary international law is enforced in a federal court, since primary responsibility for enforcing international law belongs to the national government.

Erie heralded the beginning of a genuine federal common law, as opposed to a general common law applied by state and federal courts alike. *See Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (distinguishing between federal common law and general common law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S.

398, 426 (1964) (same); *see also* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393, 433 (1997). To suggest that *Erie* excised customary international law from the fabric of federal common law is to mistake a case about federalism for a case about the separation of powers within the federal government.

This Court's decision in *Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964), put to rest any doubt that customary international law is part of federal common law. The Court observed that, although there is no general federal common law, "there are enclaves of federal judge-made law which bind the states." *Sabbatino*, 376 U.S. at 426. In *Sabbatino*, the Court applied the act of state doctrine and declined to adjudicate a claim against the Cuban government. In doing so, the Court cited with approval International Court of Justice Judge Jessup's "caution[] that rules of international law should not be left to divergent and perhaps parochial state interpretations." *Id.* at 425. Petitioner's reading of *Erie*, by contrast, compels the conclusion that customary international law lies within the purview of state courts, a conclusion this Court has rejected.[9]

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[9] The vast majority of commentators agree that *Erie* did not place the interpretation and application of customary international law beyond the authority of the federal courts. *See, e.g.*, Ryan Goodman & Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997); Stephens, *supra*; Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Frederic L. Kirgis, *Federal Statutes, Executive Orders and "Self-Executing Custom"*, 81 Am. J. Int'l L. 371 (1987); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 367 (1985); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555 (1984).

The *Sabbatino* Court established a "sliding scale" whereby federal courts can determine whether to adjudicate issues of international law: "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Sabbatino*, 376 U.S. at 428. The "sliding scale" *requires* courts to interpret customary international law to determine whether the act of state doctrine precludes exercise of the court's subject matter jurisdiction. *See id.* at 467 n.26 (White, J., dissenting); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976). If customary international law were not part of federal common law, courts could not legitimately perform this task.

Citing to *The Paquete Habana*, and thereby confirming the continuing vitality of this case after *Erie*, the Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* noted that "international law . . . 'is part of our law,'" and that "the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed . . . by international law principles. . . . " 462 U.S. 611, 623 (1983); *see also Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941). The Court reiterated this understanding in *Texas Industries v. Radcliff Materials*: "[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." 451 U.S. 630, 641 (1981). In a number of other cases, the Court has applied and interpreted customary international law, an illegitimate exercise were customary law not part of federal common law. *E.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (stating that "the practice of using international law to limit the extraterritorial reach

of statutes is firmly established in our jurisprudence"); *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (interpreting the U.N. Convention on the Law of the Sea); *United States v. Louisiana*, 394 U.S. 11, 22 (1969) (applying "generally accepted principles of international law").

The enforceability of customary international law under the ATCA can thus be thought of in two ways: (1) the ATCA can be read as creating a statutory cause of action for the enforcement of the law of nations; and/or (2) the law of nations can be viewed as judicially enforceable federal common law, with the ATCA merely providing a specific form of subject matter jurisdiction.

A number of lower courts have held that federal common law incorporates customary international law. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (describing the "settled proposition that federal common law incorporates international law"); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring) ("International law, [appellants] point out, is part of the common law of the United States. This proposition is unexceptionable."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995).

Both the Executive and Legislative branches have corroborated this understanding. Brief for the United States as *Amicus Curiae* at 1, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 606 n.49 (1980) ("Customary international law is federal law, to be enunciated authoritatively by the federal courts."); S. Rep. No. 102-249, at 6 n.6 (1991) (indicating, in legislative history of the TVPA, that "[i]nternational human rights cases predictably raise legal issues . . . that are matters of

Federal common law and within the particular expertise of Federal courts").

The *Restatement (Third) of the Foreign Relations Law of the United States* indicates that "the modern view is that customary international law in the United States is federal law. . . . " *Restatement* § 111 rept. note 3 (1987). Therefore, "[c]ases arising under international law . . . are within the Judicial Power of the United States. . . . " *Id.* § 111(2). The Court has repeatedly relied upon the *Restatement* as an authoritative declaration of the foreign affairs law of the United States. *E.g., C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 421 n.3 (2001); *Weinberger v. Rossi*, 456 U.S. 25, 28 n.5 (1982).

Against this overwhelming consensus, and contrary to *Sabbatino*, a minority of scholars and a single appellate judge dispute the federal common law status of customary international law. *See Al Odah v. United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). Petitioner and its *amici* cite Professors Bradley and Goldsmith in support of their position. *See, e.g.,* Brief of Petitioner at 31; Brief of Washington Legal Foundation, et al. as *Amici Curiae* at 18, 25. Bradley and Goldsmith contend that *Erie* "requires federal courts to identify the sovereign source for every rule of decision." *Id.* at 852. Since customary international law lacks a positivist source, they claim, federal courts cannot apply it in the absence of domestic authorization to do so. *Id.* at 853.

The contention of Bradley and Goldmith that customary international law is not federal common law contains several irredeemable flaws. First, Bradley and Goldsmith ignore rulings by this Court, notably in *First National City*

Bank, 462 U.S. 611, that customary international law is part of federal common law, and they read *Sabbatino* too narrowly.

Second, by insisting that customary international law is part of the general common law renounced in *Erie*, Bradley and Goldsmith, by their own admission, assign the interpretation and application of customary international law to state courts. Bradley & Goldsmith, *supra*, at 870. The Framers expressly rejected this result. John Jay wrote: "The wisdom of the convention, in committing such questions [involving the 'laws of nations'] to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended." *The Federalist* No. 3 (John Jay); *see also The Federalist* No. 80 (Alexander Hamilton) ("the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned").

Bradley and Goldsmith cite *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), in which the Court permitted California to set its own tax policies for multinational corporations, for the proposition that the Court is turning towards a more federalist approach to foreign affairs. Bradley & Goldsmith, *supra*, at 866. In fact, the Court has recently rejected states' interference in foreign affairs. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000); *see also American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2390 (2003). Moreover, Bradley and Goldsmith commit the same fallacy in analyzing *Barclays Bank* that they do in analyzing *Erie*, using a case about federalism to draw inferences about the very different issue of the separation of powers among the branches of the federal government.

Preserving federal courts' ability to adjudicate causes of action based on customary international law under the

ATCA does not raise the federalism concerns that animated this Court's recent decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003). In that decision, Justice Souter's majority opinion and Justice Ginsburg's dissenting opinion disagreed on the degree of clarity and explicitness required for an action by the Executive Branch to preempt action by state legislatures in a particular area. Justice Ginsburg distinguished *Crosby*, 530 U.S. 363, as a statutory preemption case, while Justice Souter emphasized that the German Foundation Agreement could not work unless, in the words of Deputy Secretary Eizenstat, "'German industry and the German government [are] assured that they will get "legal peace," not just from class-action lawsuits, but from the kind of legislation represented by the *California Victim Insurance Relief Act*.'" *Garamendi*, 123 S. Ct. at 2385.

The Executive Branch in negotiating the German Foundation Agreement clearly upheld the authority and independence of the courts to determine when to decline to adjudicate in light of U.S. foreign policy interests, that being "an issue for the courts." *Id.* at 2382. Rather than attempting to excise Holocaust-era claims from the purview of federal jurisdiction or to allege that such claims are not cognizable absent supplemental legislation by Congress, the Executive evinced its trust in the courts to use the tools available to them to defer to the other branches when appropriate, a trust that has proven well-placed. This Court's holding in *Garamendi* that the California HVIRA was preempted by the Executive's prior action does not bear on the question at issue here, namely, whether federal courts should be deprived of the ability to adjudicate questions of customary international law under the ATCA.

2. Subsequent Congressional Ratification of *Filartiga* Confirms the Prevailing Understanding of the ATCA Followed by the Ninth Circuit.

Congress has supported the involvement of courts in issues of international law in general and in ATCA cases in particular. If Congress shared Petitioner's concern that international human rights litigation treads impermissibly into a domain reserved for the legislative branch, one would not expect such support. Most notably, by enacting the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 App., Pub. L. No. 102-256, 106 Stat. 73 (1992), Congress placed its express imprimatur on the type of ATCA litigation upheld by the Ninth Circuit here. Consistent with this approach, Congress supported the Holocaust Litigation settlements as "significant first steps in the international effort to provide belated justice to survivors and victims of the Holocaust and their heirs." Resolution Expressing Support for U.S. Government Efforts to Identify Holocaust-Era Assets, 1998 H. Res. 557 (Sept. 29, 1998).

The authoritative legislative history of the TVPA is telling. It is well-established that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill. . . . " *Garcia v. United States*, 469 U.S. 70, 76 (1984). The House Conference Report evinces Congress's endorsement of the prevailing understanding that the ATCA contains a private right of action for torts committed in violation of customary international law. It also indicates that, by enacting the TVPA, Congress intended to extend to U.S. citizens civil remedies for violations of customary international law – remedies that were already available to aliens under the ATCA:

> [C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

102 H. Rep. 367 (1991). The Senate Conference Report contains similar language. 102 S. Rep. 249 (1991). Senator Arlen Spector (R-Pa), the bill's sponsor in the Senate, stated explicitly that the TVPA was enacted to avoid the type of narrow construction urged by Petitioner here:

> One might think, Mr. President, it would be unnecessary to have legislation on such a subject, because torture is such a heinous offense, such a heinous crime, that the courts would have jurisdiction without a formal legislative measure. This is necessary because of litigated cases in the field, most particularly a decision by the court of appeals for the District of Columbia circuit [in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)].

137 Cong. Rec. S 1378.

A number of lower courts have agreed that the enactment of the TVPA signals Congress's manifest approval of the international human rights litigation opposed by Petitioner.[10] Similarly, commentators have recognized the

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[10] *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.2d 88, 104 (2d Cir. 2000) ("In passing the [TVPA], Congress expressly ratified our holding in *Filartiga*. . . . "); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) ("In enacting the TVPA, Congress endorsed the *Filartiga* line of cases. . . . "); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (holding that the TVPA confirms the *Filartiga* line of cases); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 442-43 (D.N.J. 1999); *Xuncax v.*

(Continued on following page)

TVPA as an explicit endorsement of *Filartiga*. *See, e.g.*, Richard H. Fallon, et al., *The Federal Courts and the Federal System* (Hart and Wechsler) 810 (4th ed. 1996) (observing that Congress passed the TVPA "[i]n part to eliminate . . . doubts" about *Filartiga*'s correctness).

Congress's enactment of the TVPA lays to rest any concern that the Ninth Circuit's interpretation of the ATCA treads impermissibly into territory reserved for Congress.

3. The Ninth Circuit's Interpretation of the ATCA Does Not Impede the Executive Branch's Conduct of Foreign Affairs as Indicated by the Hitherto Uniform Position of the Executive Branch.

Although the current Administration argues that adjudication of ATCA cases in the absence of additional legislative authorization undermines the President's ability to conduct foreign affairs, previous administrations under both Republican and Democratic presidents have consistently upheld the ability of courts to hear disputes implicating U.S. relations with other sovereigns. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, the Court determined that the act of state doctrine announced in *Sabbatino* does not prevent courts from adjudicating disputes involving foreign states as defendants when the acts complained of are commercial, not political, in nature. 425 U.S. 682, 698 (1976). In so holding, the Court quoted a State Department letter issued during the Administration

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Gramajo, 886 F. Supp. 162, 181 (D. Mass. 1995) ("[I]n enacting the TVPA, Congress has expressed its approval of the *Filartiga* line of cases. . . . ").

of President Truman, which urged that the Court abandon the act of state doctrine entirely:

> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

Alfred Dunhill, 425 U.S. at 710-11 (quoting State Department Letter). The Executive Branch explicitly disavowed any separation of powers concerns in urging the Court to interpret and apply international law: "This Department is of the opinion that there would be no embarrassment to the conduct of foreign policy if the Court should decide in this case to adjudicate the legality of any act of state found to have taken place and to make such adjudication in accordance with any principle of international law found to be relevant." *Id.* at 710. The Reagan Administration echoed this view in an *amicus* brief filed in a later act of state case. *See Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422, 427-28 (6th Cir. 1984) (citing a joint Departments of State, Justice, and Treasury *amicus* brief disclaiming that the adjudication of a commercial dispute involving another sovereign state would interfere with an Executive Branch prerogative).

In 1988, the Reagan Administration, in *United States v. Shakur*, 690 F. Supp. 1291 (S.D.N.Y. 1988), urged a district court to interpret customary international law to find that a criminal defendant was not a prisoner of war.

See Koh, *supra*, at 1842 n.96 (describing the State Department's memorandum).

The Nixon Administration earlier had gone even further. In 1969, it urged a state court to apply and interpret customary international law. *See* Gerald L. Neuman, *Sense and Nonsense About Customary International Law*, 66 Fordham L. Rev. 371, 377 (1997) (describing the Nixon Administration's *amicus* brief to the New York Court of Appeals in *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969)).

Consistent with this support for federal adjudication in areas touching upon foreign affairs, the Carter Administration filed a brief *amicus curiae* on behalf of the plaintiff in *Filartiga v. Pena-Irala*, a case against a Paraguayan citizen living in the United States for having tortured and killed the plaintiff's seventeen-year-old brother in Paraguay, in retaliation for their father's political beliefs and activities. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). The brief encouraged the court to give effect to international human rights norms:

> [N]ot every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.

Brief for the United States as *Amicus Curiae*, *Filartiga v. Pena-Irala*, *reprinted in* 19 I.L.M. 585, 603 (1980).

The Clinton Administration in a Statement of Interest filed in 1995 and signed by the Solicitor General and the State Department's Legal Advisor likewise expressly disclaimed any concern that the court, by hearing the *Kadic* case involving claims against Radovan Karadzic for genocide, war crimes, and crimes against humanity in the former Yugoslavia, would trespass into an area committed

to the sole purview of the Executive Branch: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (quoting Statement of Interest from State Dept. and Solicitor General).

Finally, in this very case, the Clinton Administration earlier filed an *amicus* brief that did not dispute courts' proper authority to entertain ATCA claims. *See generally* United States Dept. of State, Brief *Amicus Curiae*, *Alvarez-Machain v. Sosa*, No. 99-56880 (Mar. 2000).

The current Administration's disapproval of ATCA litigation amounts to a sudden and erroneous about-face of consistent, decades-old Executive Branch policy of support for federal courts' authority to interpret and apply customary international law.

4. Adoption of Petitioner's Position Is Unnecessary Because Courts Can Decline to Adjudicate on a Case-by-Case Basis When Deference to the Political Branches Is Appropriate.

Courts have recourse to a variety of mechanisms for insuring that they do not decide matters that may complicate the conduct of foreign affairs or violate the separation of powers. Noting that "it is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance[,]" the Court in *Baker v. Carr* instructed the federal judiciary to apply a case-specific analysis to determine whether to adjudicate:

> Our cases in this field seem invariably to show a discriminating analysis of the *particular question posed*, in terms of the history of its management

> by the political branches, of its susceptibility to judicial handling in light of its nature and posture *in the specific case*, and of the possible consequences of judicial action.

369 U.S. 186, 211-12 (1962) (emphasis added).

Petitioner ignores this instruction to consider the particulars of a specific case and contends that any ATCA litigation that proceeds without positive authorization by Congress and the President should be barred. A case-by-case analysis is a far better strategy to insure against interference with Executive prerogative than an across-the-board prohibition of court action, as it better gives effect to Congress's intent in enacting the ATCA and the TVPA.

Courts have multiple tools for determining whether adjudicating a particular case would unduly interfere with the political branches' prerogative. First, courts refuse to interpret and apply customary international law unless it is well-settled and unambiguous. As indicated above, the Court in *Sabbatino* "refused [to] lay[] down or reaffirm[] an inflexible and all-encompassing rule" and instead articulated a sliding scale by which courts can judge whether they should adjudicate a dispute that might raise separation of powers concerns: "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Sabbatino*, 376 U.S. at 428. Following this directive, the Second Circuit requires that a plaintiff allege a violation of a "clear and unambiguous" rule of customary international law in order to state a claim under the ATCA. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (dismissing an ATCA claim for violations of the "right to life" and the "right to health" as "insufficiently definite"). The Ninth Circuit likewise reaffirmed in this case that

"[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Alvarez-Machain v. United States*, 331 F.3d 604, 647 (9th Cir. 2003), *quoting Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994). Courts also take account of Executive Branch statements about which international norms are binding, as this Court did with respect to the effect of cross-border abduction on a defendant's susceptibility to trial in the first case involving the actions in question here. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

A second mechanism for deferring is the act of state doctrine, which federal courts invoke if adjudicating a particular claim would invalidate a foreign sovereign's official acts within its own territory. *Sabbatino*, 376 U.S. at 416. The act of state doctrine does not strip courts of the authority to entertain disputes touching upon foreign affairs, but rather provides a rule of decision. As this Court indicated in *Ricaud v. American Metal Co.*, the rule that "the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory . . . does not deprive the courts of jurisdiction once acquired over a case." 246 U.S. 304, 309 (1918). The act of state doctrine "reflect[s] the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Sabbatino*, 376 U.S. at 427-28. The judiciary maintains its congressionally-sanctioned authority to hear international disputes, while remaining sensitive to the prerogatives of the Executive.

Third, the political question doctrine is available to assuage Petitioner's concerns, including the concern that courts will somehow interfere with the war on terrorism by entertaining ATCA lawsuits. At least two ATCA cases have been dismissed pursuant to the political question

doctrine, to avoid "placing the court in the position of announcing a view that is contrary to that of a coordinate branch of government[.]" *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1198-99 (C.D. Cal. 2002); *see also Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999). Another non-ATCA Holocaust case was dismissed pursuant to the political question doctrine, where the court found that a treaty preempted judicial cognizability. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282 (D.N.J. 1999).

Fourth, courts have invoked doctrines of sovereign immunity to dismiss claims against foreign sovereigns brought pursuant to ATCA. *See, e.g., Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003); *Ge v. Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000). The United States itself is not subject to ATCA claims, as courts have uniformly held that the United States has not waived its sovereign immunity under the ATCA. *E.g., Sanchez-Espinosa v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998). Courts have also used immunity doctrines to dismiss claims brought against U.S. officials. *Sanchez-Espinosa*, 770 F.2d 202 at 207. These tools enable courts to avoid adjudicating sensitive questions, such as those that might be raised by American anti-terrorism policies, on a case-by-case basis, without renouncing entirely the authority to continue adjudicating cases under the ATCA.

Last, courts can use their discretionary power under the doctrine of *forum non conveniens* to dismiss a case which they feel should be more properly handled by a foreign court. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).[11]

The image of a power-hungry and insensitive federal judiciary complicating foreign affairs is a shibboleth with no basis in the lived experience of litigation under the ATCA.

B. The Ninth Circuit's Interpretation of the ATCA Does Not Impede Legitimate Corporate Interests.

Acknowledging that the ATCA provides both jurisdiction and a private right of action for violations of customary international law does not impinge on legitimate corporate interests or wreck havoc with U.S. economic policy. The alleged harm remains purely in the realm of the hypothetical. As set out above, federal courts have dismissed ATCA cases that lack sufficient foundation on the facts or the law, just as they have other types of cases. Were every cause of action that could entail corporate liability removed from the scope of federal adjudication, little would remain.

To the extent that corporations' conduct does not violate customary international law, including international human rights law, there is no reason for concern. To the extent that their conduct is questionable, there is a body of case law under the ATCA that indicates what types of conduct, and what degree of complicity, entail corporate

[11] In fact, Professors Bradley and Goldsmith, in their recently published casebook, themselves recognize the above-cited self-restraints placed by courts when dealing with the subject of international law; what they label "foreign relations law." Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 39-105 (2003).

responsibility in U.S. courts. *See, e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154-58 (2d Cir. 2003).

While most American corporations do not engage in human rights abuses abroad, those that do are liable under common law tort theories for claims brought by aliens in United States courts. The ATCA is a false target in this regard.

Violations of federal common law cognizable under the ATCA are not qualitatively different from violations of any other common law standards that mature with the accumulation of judgments by common-law courts and the evolution of societal practices. Justice Breyer has recounted Justice Jackson's experience at the Nuremberg trials:

> [A]s a judge, Robert Jackson understood the value of precedent – what Cardozo called "the power of the beaten path." He hoped to create a precedent that, he said, would make "explicit and unambiguous" what previously had been "implicit" in the law, "that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds . . . is an international crime . . . for the commission [of which] . . . individuals are responsible" and can be punished. He hoped to forge from the victorious nations' several different legal systems a single workable system that, in this instance, would serve as the voice of human decency.

Justice Stephen Breyer, *Keynote Address on Yom Hashoah* (April 6, 1996), *reprinted in* 71 N.Y.U. L. Rev. 1161, 1163 (1996). Developments in the decades following Nuremberg, including utilization of the ATCA civil remedy, have largely vindicated Justice Jackson's ideal.

A static vision of customary international law, which is part of federal common law, ignores the development of global understandings prohibiting atrocities that have

occurred within living memory. These prohibitions are universal, discernible, and binding. Corporations have no better argument for escaping liability for violations of these standards than they do for escaping liability for violations of the antitrust laws, employment discrimination laws, unfair trading practices, or multiple other standards that promote corporate accountability.

The history of the twentieth century is, to a large extent, the story of the gradual elimination of "wrongs without remedies" on the global stage. The Framers, through the ATCA, gave federal courts the authority to participate in this development. Petitioner would have the Court retrench this progress. As Justice Ginsburg has observed, "[n]ational, multinational and international human rights charters and tribunals today play a key part in a world with increasingly porous borders." Justice Ruth Bader Ginsburg, Remarks for the American Constitution Society, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication* 2-3 (Aug. 2, 2003).

Corporations and other private-sector entities – such as the Swiss banks and German companies in the Holocaust Litigation – have benefited greatly from the expanding reach of global communications and transportation, and the lowering of barriers to international commerce and trade. They have also become subject, and accustomed, to multiple layers of regulation and increased accountability for their actions in various parts of the globe. The ATCA is neither unique nor remarkable in this respect, and should not be eviscerated on this basis.

CONCLUSION

For all the above-stated reasons, the Court should affirm the judgment of the court below for Respondents.

Respectfully submitted,

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